Nos. 87-821 and 87-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, *et al.*,
Petitioners,
v.
JAMES SEBBEN, *et al.*,
Respondents.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, *et al.*,
Petitioners,
v.
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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

I. JOHN ROSSI
WOODWARD DAVIS & ROSSI
Skywalk Suite 203
700 Walnut Street
Des Moines, Iowa 50309
(515) 282-6095

PAUL M. SMITH *
JOSEPH N. ONEK
ONEK KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Respondents

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF OF RESPONDENTS IN OPPOSITION

This case involves the claims of thousands of coal miners who filed for benefits under the Black Lung Benefits Act prior to April 1, 1980 but still have not received the benefits to which they may be entitled. Respondents alleged below that they, and the class they seek to represent, have been denied benefits because of the Secretary of Labor's failure to comply with a clear statutory duty

created by the Black Lung Benefits Reform Act of 1977 (the "1977 Amendments"). This statute required the Secretary to review *sua sponte* the files relating to all pending and previously denied claims, 30 U.S.C. § 945(b), applying new "criteria" that were not "more restrictive" than the "interim regulations" then being used by the Social Security Administration (SSA) to adjudicate the group of claims filed prior to July 1, 1973, *id.* § 902(f)(2). Respondents' basic argument is that the Department of Labor never performed reviews satisfying this requirement, because the Secretary refused, by regulation, to apply SSA's interim presumption of disability due to pneumoconiosis in the class of cases in which the miner had not shown evidence of ten years of coal mine employment.[1]

The issues presented for review by the petitioners are essentially twofold. The first question is the same as that presented in the pending petitions for certiorari in No. 87-1045, *Director, Office of Workers' Compensation Programs v. Kyle*, and No. 87-1095, *Director, Office of Workers' Compensation Programs v. Broyles*—*i.e.*, whether the Secretary acted consistently with the 1977 Amendments in refusing to apply the interim presumption absent a showing of ten years of coal-mine employment.[2] The second question involves the scope of the remedies available assuming, as four circuits have held, that the

[1] As discussed *infra*, the SSA regulations applied the interim presumption in any case where the claimant either had worked for ten years in the mines or had submitted other evidence that his "impairment . . . arose out of coal mine employment." 20 C.F.R. § 410.490(b)(2). Respondents below also sought to assert the rights of claimants who filed for benefits after the effective date of the 1977 Amendments but before the promulgation of the "permanent" Labor Department regulations. Such claims were also required to be adjudicated under standards no "more restrictive" than the SSA criteria. 30 U.S.C. § 902(f)(2)(C).

[2] This question, as a formal matter, has been presented in this case only by the private petitioners in No. 87-821.

Secretary's action was illegal—*i.e.*, whether respondents and the class they seek to represent may sue in district court to enforce their statutory right to a valid Secretarial review of their files without pursuing the administrative appeals process provided in the Act.

Respondents acknowledge that the conflict among the circuits on the first question may well require the Court to address that question in this or another case. However, if the Court does determine that the first issue is worthy of review, we do not believe that the Court should necessarily accept the Solicitor General's suggestion that it grant review in a case that raises solely that issue and hold the instant petitions.[3] A hold would be appropriate if the Court agrees with us that the second question presented here—the question of the proper scope of relief assuming the invalidity of the Secretary's regulations—is not independently worthy of review. However, if the Court disagrees with us concerning the independent importance of this question, then we would ask that it issue a writ of certiorari in this case now to allow simultaneous resolution of both questions, rather than holding this case pending the decision in a case raising only the former question.

STATEMENT

The Black Lung Benefits Act, passed in 1969, provided for benefits to those who are disabled by coal-mine-related pneumoconiosis, or "black lung," under two different parts. Part B, administered by the Secretary of Health, Education and Welfare through the SSA, was to provide benefits paid out of federal funds to claimants who filed prior to the end of 1972.[4] Part C, administered by the Secretary of Labor,[5] applies to all subsequent claims and

[3] *See* Petition for the Deputy Secretary of Labor *et al.* (hereinafter "U.S. Pet.") at 10, 16-17.

[4] This date was later extended to June 30, 1973. See 30 U.S.C. §§ 924, 925.

provides benefits paid either by coal-mine employers or by a special federal trust fund. *See generally Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427 (1987). The 1969 Act was substantially amended in 1972 in an effort to correct what was perceived as an unduly high rate of rejection of Part B claims.[6] The 1972 amendments called for the reopening of denied Part B claims and the application to all Part B claims of new, more liberal, statutory and regulatory standards.[7]

One key consequence of the 1972 legislation was a regulation creating the SSA "interim presumption" at issue here. Like various presumptions set out in the statute itself, this one was created in response to a recognition that "it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal-mine related, or that those diseases are in fact pneumoconiosis." *Mullins*, *supra*, 108 S. Ct. at 439. Under this regulation, a Part B claimant had the benefit of a rebuttable presumption of compensable pneumoconiosis if he produced one of several forms of specified medical evidence, 20 C.F.R. § 410.490(b)(1), and either had more than ten years of work history in coal mines, *id.* § 410.490(b)(3), *or* had submitted evidence that his "impairment . . . arose out of coal mine employment," *id.* § 410.490(b)(2). *See Mullins*, 108 S. Ct. at 437. As a result of this presumption, the rate of approval of Part B claims by the SSA increased substantially during the 1970s. However, the approval rate for the Part C claims that the Secretary of Labor began to

[5] States have the option under Part C of handling the claims themselves by setting up a qualifying workers' compensation system. *See* 30 U.S.C. § 931.

[6] Pub. L. No. 92-303. 86 Stat. 150 (1972).

[7] *Id.* § 6.

consider in 1974 remained very low, "in large part because of the absence of an interim presumption" in the separate regulations then governing Part C. *Id.*[8]

In the 1977 Amendments, Congress again changed the statute in an effort to redress the perceived problems of inappropriate denials of Part C claims and resulting inequity between Part B and Part C claimants.[9] It did so by requiring the Secretary of Labor to promulgate and apply new regulations for determining eligibility based on "criteria" that were not "more restrictive" than those being used under Part B. 30 U.S.C. § 902(f)(2).[10] Congress further provided that the Secretary of Labor should "review each claim" that had been denied or was pending under Part C "taking into account" the 1977 Amendments and should "approve any such claim forthwith if the provisions of this part, as so amended, require that approval, and . . . immediately make . . . payment of the claim . . . ." *Id.* § 945(b)(1).[11] The Secretary was instructed that if the materials in the existing file were "sufficient for approval of the claim," he should not require submission of any additional evidence, *id.* § 945(b)(2)(A), and was further instructed to pay meritorious claims retroactively, *id.* § 945(c).

[8] *See generally* Lopatto, "The Federal Black Lung Program: A 1983 Primer," 85 W. Va. L. Rev. 677, 684-87, 691 (1983).

[9] Pub. L. No. 95-239, 92 Stat. 95 (1978).

[10] These new "interim" standards were to apply to all prior claims as well as all claims filed prior to the promulgation of new permanent Labor Department regulations consistent with the 1977 act. *Id.*

[11] Congress also provided that pending or denied Part B claims should, at the option of the claimant, either be reviewed by the Secretary of Health and Human Services, followed by Labor Department review, *id.* § 945(a)(1)(A), (2), or be referred directly to the Secretary of Labor for review consistent with the 1977 Amendments, *id.* § 945(a)(1)(B), (3).

The Secretary responded to the 1977 legislation by promulgating new "interim" regulations that created a rebuttable presumption of disability that was similar to the Part B standards. 20 C.F.R. § 727.203. *See Mullins*, 108 S. Ct. at 431. However the presumption was available *only* to claimants who had had ten years of work in coal mines.[12] In contrast to the Part B regulations, there was no way in which a person with a shorter work history could invoke the presumption. As petitioners note, five circuits have addressed the validity of this limitation on the presumption, and four have held that it violates the statutory command that the Secretary apply interim criteria that are not "more restrictive" than the existing Part B criteria.[13]

The present case was filed soon after the Eighth Circuit's *Coughlan* ruling adopted the majority position on this statutory issue. Respondents, four Iowa coal miners who filed for benefits during the 1970s, sought designation as representatives of the class of all persons who (1) were denied the benefit of the interim presumption by virtue of the Secretary's rule limiting it to persons with ten or more years of mine exposure, and (2) had not pursued their claims further through individual administrative appeals. The defendants were the Secretary of Labor and various of his subordinates. Jurisdiction was predicated on 28 U.S.C. § 1361, the general manda-

[12] Section 727.203(a) limits the presumption to a "miner who engaged in coal mine employment for at least 10 years."

[13] Decisions rejecting the Secretary's position are *Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir. 1987), *cert. filed*, No. 87-1045 (December 21, 1987), and *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987), *cert. filed*, No. 87-1095 (December 29, 1987). The sole decision upholding the Secretary is *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987).

mus statute. As relief, respondents sought an order requiring the Secretary to review the files of all the class members under legally valid standards, as well as creation of a procedure whereby plaintiffs' counsel could conduct their own reviews of the Secretary's actions in each case.[14]

The defendants moved to dismiss the case for want of jurisdiction, arguing that the existence of an administrative review process for black lung claims—culminating in court of appeals review of decisions of the Labor Department's Benefits Review Board—precludes district court jurisdiction over the instant case. The plaintiffs responded that their claim of a right to appropriate Secretarial reviews of their files could only be vindicated through this case, and that jurisdiction was therefore not precluded. The district court granted the motion to dismiss. U.S. Pet. App. 19a-22a.

On appeal, a unanimous panel of the U.S. Court of Appeals for the Eighth Circuit reversed. It acknowledged that statutory review procedures are "generally the exclusive means of review," and that there is a presumption against the availability of "simultaneous review of administrative actions in both the district court and the circuit court of appeals." U.S. Pet. App. 3a-4a. But, citing precedent from the Sixth and D.C. Circuits, it held that there is a " 'residuum' " of jurisdiction in the district courts to enforce the Black Lung Benefits Act in a case of a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review.' " U.S. Pet. App. 4a (quoting *Louisville & Nashville Railroad*

[14] If claims are ultimately approved by virtue of the decision below, most will be paid, not by operators of mines, but by the federal Black Lung Disability Trust Fund. *See* 30 U.S.C. § 932(c), (j) (providing that claims granted by virtue of Secretarial reviews of files under § 945 will be paid by the fund if they were previously denied before March 1, 1978).

Co. v. Donovan, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), and *Nader v. Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972)). That jurisdiction, it held, is provided by section 1361, the mandamus statute. *Id.*

The court went on to conclude that the Secretary had violated a "clear nondiscretionary duty" to "reopen . . . and review claims" that were pending or denied as of 1978 under the revised standards contained in the 1977 Amendments. U.S. Pet. App. 4a-13a. This duty, it held, was not fulfilled with respect to claimants with less than ten years of mining employment, because they were denied the benefit of a review based on the presumption mandated by Congress.[15] The court then stated that vindication of this clear right through mandamus was not foreclosed either by the usual requirement of exhaustion of administrative remedies or by the limitations periods applicable in that administrative process. U.S. Pet. App. 13a-18a. Exhaustion and time limits for appeals, it held, do not come into play until after the Secretary has complied with his obligation to review each file under the revised standards and notified each claimant of the result.

The Eighth Circuit remanded the case with instructions to certify an appropriate class and award the limited relief of new, legally valid Secretarial reviews of the class members' files. After entry of judgment, the Secretary, along with various intervenors who are now among the private petitioners in No. 87-821, sought a rehearing *en banc*. These requests were denied on June 25 and July 24, 1987.

[15] The court also found a violation of the same basic duty with respect to claims filed after March 1, 1978 and prior to April 1, 1980, which, according to the 1977 Amendments, were also required to be adjudicated under interim criteria not "more restrictive" than the earlier SSA regulations. U.S. Pet. App. 12a-13a.

ARGUMENT

As we noted at the outset, respondents acknowledge that the "substantive" issue in this case—whether the Secretary's regulations violated the 1977 Amendments by denying the interim presumption to all miners with less than ten years of mining employment—may be worthy of review because the Seventh Circuit's recent ruling on the issue conflicts with the holdings of four other circuits.[16] Our discussion here is addressed primarily to whether, assuming that the Court is disposed to grant one of several petitions presenting this issue, it should grant the instant petition to decide the unique "remedial" questions presented by the Eighth Circuit's ruling regarding the reopening of cases that are not now pending in the administrative review process.

I. If the Court Is Disposed to Resolve the Underlying Conflict Among the Circuits, and Considers the Remedial Issues Presented Here Independently Worthy of Review, It Should Grant this Petition Rather than Holding it for Later Consideration.

The federal petitioners in No. 87-827, unlike the private petitioners in No. 87-821, have suggested that this Court should hold the instant petition and grant review in another case to decide whether the Secretary's interim regulations are legally valid. They further suggest that the Court should grant review in this case at a later date—if the substantive issue is decided against the Secretary—to decide the separate remedial issues presented only in this case. U.S. Pet. 10, 16-17. Our position is that the Court should not accept, without careful consideration, this invitation to bifurcate disposition of the questions presented here. While we do not believe that the separate remedial issues are independently worthy of review, if the Court disagrees it would be more appropriate to grant this case now in order to resolve all

[16] *See* note 13 *supra*.

issues simultaneously. We suggest this procedure for two reasons. First, there is a strong chance that the Secretary will not prevail on the substantive issue. Second, by delaying resolution of the remedial issues presented here for another year, the Court would be adding to the delays that have already prevented potentially meritorious claims from being approved for more than a decade.

A. Four Circuits Have Correctly Held that the Secretary's Regulations Violated the 1977 Amendments to the Act.

An analysis of the substantive issue suggests that there is a strong likelihood that the Secretary's position will be rejected in this Court, as it has been in four circuits. The essence of the Secretary's argument is that the 1977 Amendments, in requiring review of Part C claims under "criteria" that are not "more restrictive than the criteria" then applied to Part B claims, 30 U.S.C. § 902(f)(2), merely referred to "medical" criteria. Petitioners argue that the Secretary did promulgate regulations creating a presumption of disability due to pneumoconiosis based on medical evidence at least as generous as that previously accepted by the Social Security Administration in Part B cases. They further argue that it was legal for the Secretary to limit this presumption to miners with ten years of exposure even though the SSA presumption was not so limited, because this is not a "medical" issue.[17]

This argument is simply unconvincing. First, there is no substantial basis in the statute or its legislative history for defining the statutory term "criteria" solely in medical terms. The purpose of the requirement in the 1977 Amendments that the Secretary begin applying criteria no "more restrictive" than the SSA criteria was to "erase the perceived inequity of judging the validity of Part B (SSA) and Part C (Labor) claims by significantly different criteria." Solomons, "A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues," 83 W. Va. L. Rev. 869, 874 (1981). While part of the problem was the divergence between the existing SSA and Labor requirements for medical evidence,[18] the "most significant factor" was the "inapplicability of the interim presumption to Department of Labor claims." *Id.* at 873. *See Mullins*, *supra*, 108 S. Ct. at 437. In seeking to resolve this problem, Congress, far from focusing on "medical" standards, used a generic term intended to mandate essentially equivalent treatment of Part B and Part C claims.[19] Yet the Secretary has now adopted a reading of the statute that "would produce the anomalous result that in cases adjudicated [under Part B] the . . . presumption would apply, whereas in cases trans-

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[17] As described above, the Part B interim presumption was available to claimants who *either* had ten years of mine exposure *or* submitted evidence linking their disability to coal mine exposure. 20 C.F.R. § 410.490(b)(2), (3).

[18] This aspect of the problem was discussed in the legislative history. *See Strike*, *supra*, 817 F.2d at 403 (citing references). But as the Third Circuit has pointed out, "[r]eferences in debate to medical criteria are not dispositive [on the issue of what Congress meant by 'criteria'], since medical criteria are included" among the factors that had to be no "more restrictive." *Halon*, *supra*, 713 F.2d at 24.

[19] As one commentator has put it after reviewing the legislative history in detail, the goal was to mandate application of the entire SSA "interim presumption":

> Imposition of the "interim" presumption for use by DOL on Part C claims was done indirectly, in that the amending language required that the DOL regulations for review of pending and denied claims "not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 . . . ," meaning no more restrictive than the extremely liberal 20 C.F.R. section 410.490 "interim" regulations used by SSA after the 1972 amendments.

Lopatto, *supra* note 8, at 692 (footnote omitted).

ferred to the Secretary of Labor it would not." *Halon, supra*, 713 F.2d at 25. *See also Coughlan, supra*, 757 F.2d at 968. Such an outcome, as this Court has already suggested in *dictum* in *Mullins, supra*,[20] simply makes no sense in light of the statutory language and the goals that Congress sought to achieve.[21]

Indeed, even assuming that the term "criteria" could fairly be read to refer solely to *medical* criteria, petitioners' argument still would make no sense. If Congress mandated application of the same "medical criteria" in

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[20] In *Mullins*, the Court described section 902(f)(2) as referring to all aspects of the SSA presumption. *See* 108 S. Ct. at 430 ("The statute does require the Secretary to establish *criteria for eligibility* that 'shall not be more restrictive than' the criteria that the Secretary of HEW had established . . . .") (emphasis added); *id.* at 437 (referring to "Congress' demand that Labor's criteria 'shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973,' 30 U.S.C. § 902(f)(2), *i.e., no more restrictive than the SSA's interim presumption*") (emphasis added). (The Court's comment that the Labor presumption "satisfies" this requirement, *ibid.*, does not, of course, suggest that the Court considered and rejected all arguments concerning possible differences between the two presumptions.)

In addition, the Court in *Mullins* stated that various statutory Part B presumptions "apply indirectly to Labor claims as well" by virtue of the 1977 Amendments. 108 S. Ct. at 439 n.31. These statutory presumptions are not limited to "medical" criteria. *See* 30 U.S.C. § 921(c). This comment, therefore, further supports the view that the Amendments were intended to incorporate all aspects of presumptions applicable to Part B claims.

[21] Indeed, it can be argued that the Secretary's regulations themselves recognize the need to allow claimants the full benefit of the SSA interim presumption, by providing that, unless otherwise stated, any SSA regulations "which are not inconsistent with the 1977 amendments to the act, shall be applicable to the adjudication of claims" being reviewed by the Secretary. 20 C.F.R. § 727.4(b). *See also id.* § 727.200 ("[T]hese rules provide *additional* standards, not available in the [SSA] interim adjudicatory rules, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment.") (emphasis added).

Part C cases as were then applied in Part B cases, it can hardly have been legal for the Secretary to have promulgated comparable criteria but then made them totally inapplicable in an entire class of cases that would have been included under Part B. Obviously, the goal of Congress was not simply to force the promulgation of more generous "criteria" in the Code of Federal Regulations, but to have those criteria applied to claims under Part C as they had been under Part B.[22]

For these reasons, we think it is likely that if this Court grants full review on this statutory question it will reaffirm the position adopted by all but one of the circuits addressing the question. This forecast, we think, is an appropriate factor to consider in determining whether to defer the unique remedial issues raised in the present case, assuming that the Court determines that they are independently worthy of review.

B. Unnecessary Delays in the Relief to Be Awarded to the Proposed Class of Claimants in this Case Should be Avoided.

A second factor to consider is the delay that would be occasioned by two-step merits review of the questions presented here. All of the claimants in the proposed class in this case filed for benefits prior to 1981. Most filed in the early to mid-1970s. For some portion of this class, it is clear that the claims would have been approved long ago if they had been adjudicated under Part B by the SSA[23] or under Part C based on standards satisfying

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[22] Under the Secretary's reading, the Department could have complied with the statute by promulgating generous medical criteria but arbitrarily refusing to apply those criteria to every third case filed.

[23] As described above, claims filed after 1973 were all decided under Part C. But some claims filed prior to this time were ultimately decided under Part C due to administrative delays. When the 1977 Amendments were passed, pending Part B claims could

the statutory requirements. Thus, these claimants have been denied benefits inappropriately for a decade or more.[24]

In this factual context, if the Court is ultimately going to hear arguments on the right of respondents to seek to rectify this situation through an action in the nature of mandamus, those arguments should not be delayed for a year while the Court addresses solely the substantive issue. The more equitable and efficient approach, assuming the Court is disposed to resolve the circuit conflict on this substantive issue and is also concerned about the Eighth Circuit's remedial approach, is to grant this case and resolve all the pending issues simultaneously.

II. The Eighth Circuit's Jurisdictional Holding Was Correct.

While we are opposed to a "two-step" merits review of the questions presented here, we do not mean to concede that the second set of issues—involving remedial relief for the proposed *Sebben* class—is in fact independently worthy of review. To the contrary, the Eighth Circuit's

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be granted by SSA only if the evidence already in the file satisfied the governing requirements. 30 U.S.C. § 945(a)(1)(A). In all other cases, these pending claims were referred to the Secretary of Labor for a determination under the Part C interim regulations at issue here. *Id.* § 945(a)(1)(B), (2)(B), (3).

[24] Petitioners suggest that these claimants could now file for benefits under the post-1980 "permanent" standards. U.S. Pet. 12. *See* 20 C.F.R. Part 718. It is clear, however, that the current standards are much more restrictive than either the Labor or SSA versions of the interim standards applicable to claims filed prior to April 1, 1980. *See* Lopatto, *supra* note 8, at 694-95. Thus, relegating members of the proposed class to review under the current standards will mean that many will be denied benefits who were entitled to them under the earlier standards. Indeed, this fact is confirmed by the private petitioners dire predictions of fiscal catastrophe stemming from the decision below, Pet. 18-20, even assuming that the federal petitioners are correct in suggesting that these predictions are exaggerated, U.S. Pet. 12.

ruling that the district court had jurisdiction to compel the Secretary to perform the clear statutory duty to review pending and denied claims under revised criteria represents an appropriate disposition in the factual circumstances of this case and breaks no new ground. This ruling does not in any way threaten the basic administrative review process provided in the Act, because it applies only where, as here, Congress has created a separate, one-time right that cannot, by definition, be fully vindicated if individual claimants are required to utilize their administrative remedies.

In the 1977 Amendments, Congress created a carefully designed remedy for what it perceived as wholesale inappropriate denials of Part C claims due to overly restrictive regulations. That remedy was a program of reviews by the Secretary of the files of every denied or pending claim, applying criteria no "more restrictive" than the existing Part B interim standards. If such a review revealed that a claimant was eligible, the Secretary was directed to pay the claim immediately, on a retroactive basis. In direct contrast to the provisions in the 1977 statute concerning reconsideration of claims by the Secretary of Health and Human Services,[25] the language governing the Secretary of Labor made it clear that there was to be no requirement that claimants request a review or refile their claims. Congress determined that Part C claimants, having filed once and been faced with inappropriate denials, should not have to take any other steps in order to receive benefits under valid standards.[26]

As we have discussed, the key element in the reform mandated by Congress was application of the Part B in-

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[25] *See* 30 U.S.C. § 945(a)(1).

[26] As Congressman Perkins put it, the new law required "*automatic* review of all denied or pending claims in the light of the changes in the law made by this legislation." 124 Cong. Rec. 3426 (1978) (emphasis added).

terim presumption to claims that had previously been denied due to the absence of such a presumption in the original Part C regulations. Where the reform was allowed to work, it had the desired effect. Primarily because of the application of the presumption to claims of miners with more than ten years of exposure, Labor Department approval of claims increased dramatically.[27] However, with respect to the class at issue here—those without ten years of documented mining exposure in their files—the Secretarial reviews conducted after the 1977 Amendments were largely meaningless, since these claimants were categorically excluded from application of the interim presumption. In this sense, while the Department of Labor went through the motions of complying with the statute with respect to these claimants, it did not, as a practical matter, provide them with the key benefit that Congress mandated.

The gist of petitioners' argument is that the Secretary, having been instructed to review all files and pay benefits under the interim presumption without requiring claimants to take any further action, could instead deny this entitlement to a class of claimants and demand that they pursue administrative hearings and appeals in order to vindicate their statutory rights. For this class, under petitioners' theory, the Secretary was authorized to transform a right to *sua sponte* review under the interim presumption into a right to obtain application of that presumption only through clearly futile pursuit of the entire administrative process and an appeal to a court of appeals.[28] In effect, this theory means that the Secre-

[27] By 1978, the Labor Department had approved less than 5,000 Part C claims while rejecting 68,100 and leaving 52,000 still pending. Lopatto, *supra* note 8, at 691. By 1981, the Department had approved 89,400 Part C claims, some of which, of course, had been filed after 1978. *Id.* at 693.

[28] Because the restrictions on application of the interim presumption were contained in the Secretary's formal regulations, a claimant could not have won application of the interim presumption to his claim at any level of the process short of a court appeal.

tary had the power to rewrite the 1977 Amendments to require that one class of claimants—who had (1) already filed claims and (2) submitted evidence sufficient to justify relief under the revised standards—pursue three levels of review before they could hope to have the revised standards applied to their cases. For this class, there simply would be no real right to a nonadversarial, unrequested review of the existing files under the statutorily mandated standards, despite the express language of the 1977 Amendments.

The practical impact of the Secretary's conduct here was especially serious, since it was predictable that many eligible claimants, informed that their claims had been denied in Secretarial reviews, would not pursue those claims further. Many members of the proposed class, for example, had already had their Part C claims denied once under the more restrictive pre-1977 regulations. When informed by the Secretary that those same claims had been reviewed under the new, more generous 1977 Amendments and still found wanting, it was hardly likely that many such claimants would retain counsel and begin the administrative review process all over again. Indeed, this was the very problem that Congress sought to avoid by creating a right to an automatic review of all cases applying the new standards.

Faced with these circumstances, the Eighth Circuit held that this was an appropriate case in which to allow the district court to vindicate the right to a valid Secretarial review outside the statutory appeals process. Such a ruling, as a general matter, is hardly novel. In numerous cases, plaintiffs have been allowed to bypass administrative appeals and go straight to court if (1) they are asserting a right that is collateral to the issues assigned to administrative tribunals and (2) that right would be irretrievably lost or they would be otherwise irreparably harmed if forced to pursue the statutory process. In some cases, such as under the Social Security Act, juris-

diction for such claims is founded upon a specific grant within the substantive statute, but applicable exhaustion requirements and time limits are waived. *See Bowen v. City of New York*, 476 U.S. 467, 106 S. Ct. 2022, 2029-33 (1986); *Matthews v. Eldridge*, 424 U.S. 319, 326-32 (1976).[29] In other cases, "nonstatutory" review of administrative action is based on the general grants of jurisdiction in 28 U.S.C. § 1331 (general federal question jurisdiction)[30] or 28 U.S.C. § 1361 (mandamus).[31]

In sum, it is well established that in "exceptional situations . . . a litigant [may] invoke the equitable powers of a district court to preserve a substantial right from irretrievable subversion in an administrative proceeding" without pursuing statutory appeals. *Nader v. Volpe*, 466

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[29] Under the Social Security Act, reliance on the specific grant of jurisdiction in the Act is the result of the fact that the statute itself arguably precludes reliance on general jurisdictional statutes. *See* 42 U.S.C. § 405(h). *But see Ellis v. Blum*, 643 F.2d 68, 77-78 (2d Cir. 1981) (procedural claims may be litigated under mandamus jurisdiction); *Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984) (statutory claims that cannot be asserted through other avenues may be litigated through mandamus).

[30] *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 187-91 (1958) (nonstatutory review in district court of NLRB certification order allowed because Board action deprived plaintiffs of a statutory right that they could not enforce through statutory review procedures); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773-74 (1947) (sufficient showing of "inadequacy of the prescribed procedure and of impending harm [may] permit short-circuiting the administrative process"); *id.* at 774 (exhaustion rule does not apply where "the prescribed remedy . . . will . . . certainly or probably result in the loss or destruction of substantive rights"); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 142-43 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342, 343-45 (D.C. Cir. 1965).

[31] *See, e.g., Ganem v. Heckler*, 746 F.2d 844 (D.C. Cir. 1984); *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981).

F.2d 261, 269 (D.C. Cir. 1972). Indeed, this principle has been recognized even in decisions under the Black Lung Benefits Act that have held that the availability of a statutory appeals process under the Act generally precludes actions brought outside that process. *See Louisville & Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) ("in narrow circumstances some residuum of federal question subject matter jurisdiction may exist in the United States District Court"); *Compensation Department of District Five, United Mine Workers v. Marshall*, 667 F.2d 336, 343 (3d Cir. 1981) ("If the remedies provided for in the statutory scheme of review are inadequate in a particular case, an argument can be made that Congress did not intend to forbid the district courts from taking jurisdiction.") The decision below simply applied this principle, based on the conclusion that in the unique circumstances of this case, the Secretary had denied claimants a right that could not, in principle, be vindicated if those claimants were required to pursue the administrative process on an individual basis.

In this case, the jurisdictional theory asserted by respondents, and accepted by the court below, was "nonstatutory" review under section 1361, the mandamus statute. The decision to assert a jurisdictional basis wholly independent of the Black Lung Benefits Act was required here because the particular grant of jurisdiction provided for "statutory" appeals under the Act was not appropriate or even available. The administrative process for black lung claimants is based, through express incorporation,[32] on the Longshore and Harbor Workers' Compensation Act, which provides for appeals by claimants to the courts of appeals from "final orders" of the Benefits Review Board. 33 U.S.C. § 921(c).[33]

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[32] *See* 30 U.S.C. § 932(a).

[33] The Act provides for district court jurisdiction solely over claims to enforce compensation orders. *Id.* § 921(d).

Here, there could be no final order of the Board if respondents were to vindicate their right to receive a valid review of their files without having to litigate, or relitigate, their claims themselves. Moreover, the courts of appeals arguably could not vindicate the right at issue because they could only adjudicate individual, not class, claims.

Respondents' reliance on section 1361—rather than the general jurisdiction and equitable powers of the district courts—was also appropriate, although perhaps not mandatory.[34] Actions "in the nature of mandamus" may be brought where, as here, they seek to vindicate clear rights that could not be effectively asserted in alternative statutory review procedures. *See, e.g., City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984), *aff'd on other*

[34] The decision to rely on mandamus was motivated by the fact that the Black Lung Benefits Act precludes application of the judicial review provisions of the Administrative Procedure Act—provisions that are usually cited in tandem with the general jurisdictional statute, 28 U.S.C. § 1331, in actions seeking review of administrative agencies. *See* 30 U.S.C. § 956. However, even in the absence of the APA, there is authority for the view that the district courts retain general equitable powers to review clearly illegal actions of federal officials for which there is no other appropriate remedy. *See, e.g., Olegario v. United States*, 629 F.2d 204, 224 n.9 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 142-43 (D.C. Cir. 1971). *See generally* Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Administrative Action," 81 Harv. L. Rev. 308, 321-26 (1967). The decision below thus could be upheld without reaching any questions concerning mandamus jurisdiction. *See Ganem v. Heckler*, 746 F.2d 844, 848-49 (D.C. Cir. 1984) (where mandamus jurisdiction is asserted, court must consider other possibilities "both because 'we are sensitive to an obligation to explore any promising avenue to the District Court's jurisdiction, whether or not suggested by the parties,' . . . and because, to determine whether mandamus jurisdiction is available, we must first determine whether there are any other available routes through which federal jurisdiction could be exercised . . . .") (citation omitted).

grounds, 476 U.S. 467 (1986); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 968-69 (8th Cir. 1983); *Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983). Mandamus provides a remedy for a plaintiff "if he has exhausted all other avenues of relief and . . . if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Here, as we have discussed, there was no administrative proceeding that could vindicate respondents' right to receive valid *sua sponte* reviews of their cases. Moreover, the Secretary's obligation to conduct such reviews, under standards no "more restrictive" than those previously applied in Part B cases, was explicitly set out in the statute and plainly nondiscretionary.[35]

Petitioners attempt to foreclose mandamus relief here in several ways. First, they argue that, even if the Secretary's actions are illegal, such a finding of illegality depends on interpretation of a statute and thus is not sufficiently "clear" to justify mandamus relief. This argument, however, is based on citations to old cases that do not reflect the prevailing rule. Numerous more recent cases hold that, while mandamus is restricted to enforcement of clear legal duties, a court may interpret a statute in determining whether such a duty exists. *See Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Naporano Metal & Iron Co. v. Secretary of Labor*, 529 F.2d 537, 542 (3d Cir. 1976) (granting mandamus to enforce statute even though Secretary's conduct, as here, conformed with regulations interpreting that statute); *Mattern v. Weinberger*, 519 F.2d 150, 156 (3d Cir. 1975), *vacated and remanded on other grounds*, 452 U.S. 987

[35] As Congressman Perkins put it, every claimant was "*absolutely entitled* to review" conforming with the 1977 Amendments. 124 Cong. Rec. 3426 (1978) (emphasis added).

(1976). Thus, while mandamus review of administrative action may be narrower than usual administrative review in a case premised solely on ~~an alleged~~ "abuse of discretion," a court has the power to act in either case when it determines that an agency has acted contrary to governing law.[36]

Petitioners also argue that mandamus relief is barred because respondents and members of the proposed class failed to pursue administrative appeals, within the time provided by statute, when they were notified that the reviews of their claims had resulted in denials. This argument, however, simply misunderstands the basis of the decision below. The Eighth Circuit's approval of mandamus relief in this case was premised on the conclusion that the statutory administrative review process was not an available means of vindicating respondents' right to a valid Secretarial review of their claims. As we have discussed, if individual claimants were required to pursue that process to its conclusion in the courts of appeals in order to have the interim presumption applied to their claims, they would already have lost the right that Congress created for them—the right to have their existing claims reviewed and reconsidered under revised standards without having to relitigate them themselves. If this conclusion is valid, it follows that the exhaustion and timeliness requirements cited by petitioners are simply irrelevant, because they apply to a particular statutory procedure that respondents could not, and need not, invoke.

Finally, petitioners suggest that the relief ordered by the court below violates principles of *res judicata* because it has the effect of reviving claims that were previously closed by virtue of claimants' failure to pursue administrative appeals. This argument is again answered by the fact that the right at issue—the right to a

[36] *See* 4 K. Davis, *Administrative Law Treatise* § 23:13 (2d ed. 1984).

valid Secretarial review of existing files—is not a right that could be effectively vindicated through such appeals. In this context, a *res judicata* argument is just as misplaced as it was in *Bowen v. City of New York, supra*, where this Court authorized judicial enforcement of the collateral right to a valid first-level disability review on behalf of Social Security claimants who had failed to pursue administrative relief. *See* 106 S. Ct. at 2031. There, as here, the right at issue was one that could not have been vindicated in the administrative process and claimants would have been irreparably harmed if they had been required to go through the meaningless exercise of a full administrative review.[37] And, while the jurisdictional basis of the claims approved in *City of New York* was a specific provision of the Social Security Act rather than the mandamus statute, the applicable standards for determining when a plaintiff may sue to vindicate a collateral right despite a previous failure to pursue administrative appeals are, as we have discussed, essentially the same under either jurisdictional theory.

For all of these reasons, we believe that the Eighth Circuit's decision to allow a mandamus remedy for the unique legal violations at issue here was both correct and well within the boundaries of many previous rulings. It follows that the remedial questions raised in both petitions are not independently worthy of review by this Court.

[37] In *City of New York*, the irreparable harm was primarily injury caused to mentally ill disability claimants by erroneous denials at the initial decisionmaking stage. 106 S. Ct. at 2032. Here, by contrast, the irreparable harm stems from the fact that if claimants did pursue administrative appeals they would lose their essentially procedural right not to have to litigate a valid claim twice. In this sense, the harm here is more comparable to that discussed in *Matthews v. Eldridge, supra*, which involved a constitutional claim of a right to predeprivation hearing—a claim that could not in principle be vindicated through subsequent administrative appeals. *See* 424 U.S. at 330-31.

CONCLUSION

The petitions should either be held pending disposition of the substantive statutory issue in another case or, if the Court deems the remedial issues independently worthy of review, should be granted to allow simultaneous disposition of all the questions presented.

Respectfully submitted,

I. JOHN ROSSI
WOODWARD DAVIS & ROSSI
Skywalk Suite 203
700 Walnut Street
Des Moines, Iowa 50309
(515) 282-6095

PAUL M. SMITH *
JOSEPH N. ONEK
ONEK KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Respondents

* Counsel of Record